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IN THE

# Supreme Court of the United States

No. 70-5097

ALEXANDER McCLANAHAN,

*Petitioner,*

v.

MORAUER & HARTZELL, INC.,
LIBERTY MUTUAL INSURANCE COMPANY,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF FOR THE PETITIONER

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## BRIEF FOR THE PETITIONER

## OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (A. 69) is reported at 439 F.2d 550, _____ U.S.App.D.C. ___ (1970).[1]

[1] "A" refers to Appendix page number. "R" refers to the Index number of the record.

## JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1970. (A. 74) A timely petition for a Writ of Certiorari was filed on March 30, 1971, and was granted June 1, 1971. The jurisdiction of this Court is invoked under 28 United States Code 1254(1).

## QUESTIONS PRESENTED

1. Under the Longshoremen's and Harbor Workers' Compensation Act when a third party tort suit is settled by compromise for an amount of money that is less than that for which the employer has been held liable by the Bureau of Employee's Compensation, and such settlement has been made without first obtaining the consent of the employer, then the employee is barred from receiving further compensation under the Act. If the amount received by the settlement is found to have resulted from a judicial evaluation of the claim, it is not considered to have been settled by compromise and the claimant is entitled to receive further compensation under the Act. The question is, what participation by a judge would suffice in order to consider the settlement figure to be the result of a judicial determination?

2. Petitioner's injury was unquestionably the result of the aggrevation of a pre-existing condition, a mental illness. The Deputy Commissioner has never made a finding that the petitioner's injury, his mental illness, has improved to the extent that he should be able to return to work. Instead, the Deputy Commissioner made a finding that as of November 1, 1965, the petitioner's condition had reverted to the status which existed prior to the accident on October 19, 1962. Under the case law of the District of Columbia, the employer must compensate the workman for the consequences of an accident although his previous defects cooperated in producing them. Is the Deputy Commissioner's above-mentioned "status" finding consistent with the case law of the United States Court of Appeals for the District

of Columbia in its interpretation of the Longshoremen's and Harbor Workers' Compensation Act?

3.(a) Petitioner filed his formal application to modify the award of 1964 in 1967 over a year after the award. At the initial hearing before the Deputy Commissioner this issue was not raised. Can it be raised after the evidence has been submitted?

3.(b) Respondent filed a complaint attacking the Deputy Commissioner's ruling within thirty-day statutory period, suspending the Order entered therein. Petitioner filed a Motion to Intervene with Answer, Cross-Claim and Counter-Claim some four months later. Having been allowed to intervene may petitioner file Cross-Claim and Counter-Claim?

## STATUTE INVOLVED

The statute which is involved in this case is Section 33(g) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 933(g)).

> "If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined by subdivision (f) only if such compromise is made with his written approval."

## STATEMENT OF THE CASE

Petitioner is a person with a long history of mental illnesses. Some time in 1959 or 1960, he was hired as a laborer by Morauer and Hartzell, Inc. He worked continuously for them until the date of the accident, October 19, 1962. On that morning, petitioner was at work digging holes that would subsequently be filled with cement for building footings. He and another laborer were told to return to a hole that they had finished digging earlier to

deepen it around the sides. Following his earlier emergence from this hole, final preparations had been made for the pouring of the concrete. This included placing steel bars crossways for the purpose of reinforcement. Since these bars were about to become immersed in concrete it was not necessary and it was not the practice to make them very secure.

While the petitioner and the other laborer were digging in the hole, the steel bars, that were only a short distance above their heads, collapsed striking the petitioner on the skull. He was transported to the hospital where his wound was treated. Since that time, petitioner has not worked anywhere and he is firmly of the belief that he cannot. Petitioner claims that a recurrence of the mental illness and emotional anxiety which had not disturbed him in over two years prior to the accident resulted from this injury.

**FIRST PROCEEDING BEFORE DEPUTY COMMISSIONER**

A claim was duly filed with the Bureau of Employee's Compensation, hereinafter referred to as the "Bureau", and on August 24, 1964, respondents were ordered to pay compensation to petitioner for temporary total disability at the maximum rate of $70.00 per week for a period from October 20, 1962, to November 1, 1963. The total award was $3,780.00. (A. 1)

**UNITED STATES DISTRICT COURT; THIRD PARTY CLAIM**

Prior to this award, petitioner and his wife filed a civil action against a third party tort-feasor, Ray Gains, Inc., in which they alleged that the negligence of one of their employees was the proximate cause of the pipes collapsing in the hole where petitioner was working.

Petitioner changed counsel a number of times and finally reported for trial in January, 1967, with no counsel. Judge Luther W. Youngdahl continued the case until February 20, 1967, advising the petitioner to return with counsel at that

time. Some time during this period present counsel agreed to represent him in the third party claim.

On the morning of February 20, 1967, Judge Youngdahl called counsel into his chambers and stated that he had read the file and that from his years of experience he had arrived at what he considered a fair evaluation of the worth of the claim. Besides the pleadings, the file included a deposition of plaintiff taken by the defendant and a pretrial statement which listed the special damages claimed by plaintiff, as well as the defendant's theory of defense. An original demand of $9,000.00 was rejected by the Judge as excessive. He then had discussions with counsel separately and together. The outcome of these discussions was a consent judgment in the total amount of $5,000.00, of which $2,000.00 was awarded to the petitioner and the balance of $3,000.00 to his wife for loss of consortium. (A. 4)

Nobody from the compensation carrier participated in these discussions nor was their written consent to the amount sought.

Judge Youngdahl then recommended that we go into the courtroom and have the petitioner and his wife voice their acceptances of the consent judgment. At that time he advised them to return to the Bureau to seek a modification of their earlier award.

## SECOND PROCEEDING BEFORE BUREAU OF EMPLOYEE'S COMPENSATION

On July 26, 1967, petitioner filed a claim with the Bureau seeking a modification of the award of August 24, 1964. He claimed permanent total disability. Petitioner had written a letter complaining about the earlier award a few weeks after it was made. Counsel for petitioner had intended to use this letter as notice of petitioner's claim to modify the award within the one year time limitation. However, at the opening of the hearing, the Deputy Commissioner asked what was at issue and at that time the

respondents did not raise the issue of timeliness and thereby waived it.

Hearings were held on December 11, 1967, and March 28, 1968. (A. 7, 31, R. 9) It was respondent's contention that petitioner was not entitled to further compensation on the grounds that he had compromised his third party suit for an amount less than that which the Bureau had awarded him without obtaining their consent as required by Section 933(g) of the Longshoremen's and Harbor Workers' Compensation Act.

Respondents called John F. Mahoney, Jr., Esquire, who was the attorney representing the third party tort-feasor in the discussions with Judge Youngdahl, and he was questioned at length concerning these discussions. (A. 31, R. 9, p. 49) There was no other evidence on the question of whether or not the consent judgment was the result of a judicial determination and thus not to be viewed as a compromise barring further recovery. On the basis of this evidence, the Deputy Commissioner concluded that the settlement was the result of a judicial evaluation and therefore the petitioner was not barred from returning to the Bureau and seeking a modification of the earlier award.

The only other testimony at the hearing was that of Dr. Marvin Korengold, a neurologist. Dr. Korengold had examined the petitioner on July 15, 1963, and on February 17, 1967. He was asked to give his medical opinion concerning the permanency of the petitioner's injury. This colloquy followed:

> "*Witness:* From a neurological view his disability is zero, in terms of neurological testing and functioning. From an emotional point of view, this really becomes a psychiatric determination, which I don't know would be fair for me to state. But from what I have been able to see and observe of this man, I

feel he is emotionally seriously disabled. And I am not taking the position that he is emotionally disabled at this point because exclusively of the accident. I am taking the position that the accident increased his emotional stress and helped to fixate in some way this man upon his emotional sysmptoms.

*Deputy Commissioner:* You feel, then this injury aggrevated his pre-existing emotional problem. Is that right, doctor?

*Witness:* Yes....

*Deputy Commissioner:* Do you feel he is totally disabled from performing any type of work.

*Witness:* From a physical point of view--no.

(Then further on)

*Witness:* From an emotional point of view, I cannot visualize this man working, unless the psychiatrists are able to help him." (A. 21, R. 9)

The only other medical evidence received by the Deputy Commissioner was a letter dated December 23, 1965, that Dr. Leon Yochelson had written to John F. Mahoney, Jr., Esquire, who at the time was representing Ray Gains, Inc., in the third party suit. (A. 50) According to its contents this letter was based upon a two hour interview with the petitioner five days prior to the date of the letter. This would be over three years after the accident and nearly two years before the hearing. It concluded with the following paragraph:

> "Mr. McClanahan has a history of both periods of anxiety and of an unstable, inadequate and dependent personality. I have no evidence that his personality at this time is any different than what it had always been during his adult years and therefore conclude that there is no relationship between his complaints and the events of October 19, 1962." (A. 54)

On the basis of this evidence, the Deputy Commissioner made a finding for temporary partial disability (25% impair-

ment) for a period of 104-2/7 weeks. (A. 62) He then stated:

> "That as of November 1, 1965, the claimant's emotional and functional symptoms due to the injury terminated and his condition reverted to his status which existed immediately prior to the injury of October 19, 1962." (A. 64)

## SECOND PROCEEDING IN THE UNITED STATES DISTRICT COURT

Respondents filed a complaint in the United States District Court praying for relief from the ruling. (R. 1) They based their contentions on a lack of substantial evidence to support the Deputy Commissioner's findings in three areas: (1) appellant's claim was not timely filed; (2) the record was void of evidence of a change in petitioner's condition warranting a modification of an earlier award, and (3) that the consent judgment was not based on a judicial evaluation but was in fact a compromise and therefore under the circumstances petitioner was barred from receiving the award.

Petitioner filed a Motion to Intervene, accompanied by an Answer, a Cross-Claim and a Counter-Claim. (A. 65, R. 4) The basis for the Cross-Claim and Counter-Claim was that there was not sufficient evidence for the Deputy Commissioner's finding that petitioner was only temporarily partially disabled (25%), and that he reverted automatically to this prior status on November 1, 1965. A Motion to Dismiss this action as untimely was filed by the respondents and denied. (R. 8) Cross Motions for Summary Judgment were filed and argued before Judge George L. Hart of the United States District Court for the District of Columbia. (R. 9, 10, 15) At the hearing, the only action on which the Judge ruled was that concerning the matter of the finding of a judicial evaluation by the Deputy Commissioner. He ruled that this was not such a determination but was instead a settlement by compromise, thereby over-ruling the award

made by the Deputy Commissioner. All the other questions became moot. (A. 67, R. 18)

## PROCEEDINGS BEFORE THE UNITED STATES COURT OF APPEALS

An appeal was noted by the petitioner to the United States Court of Appeals for the District of Columbia on February 16, 1970. Briefs were filed by petitioner and respondents and the case was argued on November 9, 1970. On December 30, 1970, the United States Court of Appeals affirmed the judgment entered in the United States District Court. (A. 74, R. 24)

## SUMMARY OF ARGUMENT

### I

The United States Court of Appeals for the Fourth Circuit in *Bell v. O'Hearne,* 284 F.2d 777 (1960) held that when a claim against a third party tort-feasor was settled after there had been a judicial evaluation made of the claim it was not necessary to obtain the consent of the compensation carrier in order to keep the claimant's compensation rights alive.

In *Banks v. Chicago Grain Trimmers Association,* 390 U.S. 459, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968) this Court upheld this principle in a case involving a similar fact situation. It stated:

> "Section 33(g) protects the employer against his employee's accepting too little against a third party. The danger is not present where damages are determined, not by negotiations between the employee and the third party, but rather by the independent evaluation of a trial judge."

In the instant case the petitioner's third party claim was settled in a conference held just before trial. It was attended by the attorneys for the claimant and the third party tort-feasor in the chambers of the trial judge. The judge participated in this settlement conference. There was

no representative from the compensation carrier nor was there consent sought as to the settlement figure.

The United States Court of Appeals for the District of Columbia Circuit distinguished this case from the *Banks* ruling referring to the judge's participation as exploratory. They emphasized the need for a full trial before the judge could evaluate the claim.

It is urged that this was not the ruling in *Banks* but in fact what *Banks* emphasized was the participation in the settlement by the trial judge as against the attorneys for the claimant and third party tort-feasor negotiating alone. To say that where settlement is made under those circumstances, it must be conclusively presumed that the compensation carrier's rights were prejudiced is to conclude the judge is incapable of protecting their rights.

Furthermore, it is not consistent with the present trend which is to encourage settlements. Trials in hopeless cases would be made necessary by the insurance carrier's refusal to consent to what might be a fair settlement.

## II

The claimant's injury is the aggrevation of a pre-existing condition, a mental illness. When he was struck on the head on October 19, 1962, his condition was so aggrevated that he has never been able to return to work. He was first made an award of temporary total disability through November 1, 1963.

In his application to modify it to permanent total disability, the Deputy Commissioner ruled that he was 25% impaired from November 1, 1963, until November 1, 1965, and then his status reverted to that which existed prior to the accident.

It is urged that there is not substantial evidence, as a matter of fact, no evidence at all, to substantiate a finding of partial disability nor that he is recovered to the extent that he can return to work.

The Court designated petitioner's condition with a "before and after" status. This is contrary to the case law in the District of Columbia which states that "the employer must, in general, compensate the workman for the consequences of an accident although his previous defects cooperated in producing them" *National Homeopathic Hospital Association of District of Columbia v. Britton*, 79 U.S. App. D.C. 309, 147 F.2d 561 (1945).

Applying the above rule to the evidence produced at the hearing requires a finding of permanent total disability.

**III(a)**

Respondent raised two points of timeliness. First, was the petitioner's failure to seek a modification of the award within the one year statutory period. It is urged that the respondent was required to raise this defense at the first hearing and by its failure to do so, waived it. Section 13(b) of the Act so provides.

**III(b)**

The second issue of timeliness relates to petitioner's proceedings of cross-claim and counter-claim filed in the United States District Court. Respondent had filed a complaint in the District Court on the 29th day thereby suspending the order of the Deputy Commissioner. A few months later, petitioner filed a Motion to Intervene with an Answer, Cross-Claim and Counter-Claim attached. The Court granted the Motion.

Although there are no cases exactly on point since the Federal Rules of Civil Procedure went into effect, intervention has been allowed as a matter of right in analagous situations. Furthermore Counter-Claims have been allowed as coming within the terms of Rule 13(a) as a claim which "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. *Switzer v. Locklin* (C.A. 7, 1954) 207 F.2d 483, Cert. den. (1954) 347 U.S. 912, 74 S.Ct. 477, 98 L.Ed. 352.

## ARGUMENT

### I

**COURT ERRED IN FAILING TO FIND THE SETTLEMENT TO BE THE RESULT OF A JUDICIAL EVALUATION THEREBY ALLOWING CLAIMANT TO SEEK FURTHER COMPENSATION EVEN THOUGH COMPENSATION CARRIER'S CONSENT TO SETTLEMENT HAD NOT BEEN OBTAINED.**

In the earlier days of the Longshoremen's and Harbor Workers' Compensation Act, Section 33(g) was given a very strict interpretation and anything short of a full-scale and time-consuming trial was considered a compromise. As stated previously, when this compromise resulted in a settlement whereby the claimant received an amount less than he had previously received from the compensation carrier and the compensation carrier had not given his consent to the settlement, claimant was barred from further recovery. In recent years, on the basis of two very important cases interpreting this statute, deep inroads have been made which have lessened the harsh effects of these earlier cases. They are *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968) and *Bell v. O'Hearne*, 4th Cir. 284 F.2d 777 (1960).

It was felt that the strict interpretations only served to benefit the insurance companies with windfalls and at the same time cause needless and unfair hardships to those who had been victims of industrial accidents.

Furthermore, although not mentioned in any previous opinions, it caused settlements to be discouraged and courts, already bogged down with heavy calendars, were burdened with trials where a plaintiff might not have any hope of prevailing because of his own contributory negligence, a defense unavailable to the employer.

There is no doubt that there is merit in protecting the carrier's lien, but there is some question as to how much protection is required. This is especially true when failure

to meet that standard can result in such a devastating hardship to be visited on the victim of an industrial accident. In the instant case, the victim has not worked since October 19, 1962, a period of almost nine years. At the hearing the doctor in his testimony implied that he did not see much likelihood that he would ever work again.

> "From an emotional point of view, I cannot visualize this man working, unless the psychiatrists are able to help him." (A. 21)

But the purpose of this Act is to provide assistance for employees injured at their work, and "the Act must be literally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Bell v. O'Hearne*, supra. Also Section 20 of the Act in discussing presumptions states:

> "In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary, (a) That the claim comes within the provisions of this Act." 33 U.S.C. 920.

In the first of these two cases, *Bell v. O'Hearne*, supra, a widow sued the third party tort-feasor in a wrongful death action. She was awarded a judgment of $6,500.00. She settled this judgment for $5,000.00 and then returned to the Employee's Compensation Commission for further benefits. The carrier apparently recovered the bulk of the $5,000.00 because their lien exceeded that amount, in fact, it was implied in the case that it exceeded $6,500.00. At the time she compromised, and it is hard to see this as anything other than a compromise if such is the holding in the instant case, the widow did not obtain the carrier's consent. Judge Simon Sobeloff in his opinion traced the history of the cases interpreting this Section of the Act, 933(g), and concluded that the carrier had not been prejudiced since there had been a judicial determination of the value of the claim.

The concept of a judicial determination was brand new. It is to be noted also that the figure that was judicially determined was really nothing more than a starting point to use for bargaining towards a settlement between the parties. It can safely be assumed that this bargaining was done in the absence of a judge. In fact, it can further be assumed that the bargaining was more than likely done some time after the trial in a climate lacking in the pressures surrounding the parties negotiating before a judge moments before a jury is impaneled.

As is noted, the big difference here is that the $5,000.00 settlement was the result of bargaining between the two parties alone, without a judge to protect the rights of the employer. There was no way in the world that the $1,500.00 that had been bargained away to gain the settlement, could be recouped by the lienor.

It is urged that petitioner stands in a higher position than the claimant did in *Bell v. O'Hearne*, supra. In fact, his position is about on a par with that of the claimant in *Banks v. Chicago Grain Trimmers Association*, supra.

The United States Court of Appeals for the District of Columbia Circuit, in affirming the District Court in the instant case, drew three distinctions between the *Banks* case and the instant case. With all due respect to the Court of Appeals, it is urged that these distinctions are lacking in substance and more important, do not go to the all important question of prejudicing the carrier's lien.

Firstly, it is stated that "the Consent Judgment was not the result of the judge's independent finding of the value of the claim *after a full presentation of the evidence* but was at most an informal exploratory attempt to determine the possibilities for private settlement." (Emphasis added). (A. 73)

The above clause is emphasized because petitioner submits that factually this is the only difference between the instant case and *Banks*. What is really being discussed is the rela-

tive knowledge of the judges in each case. Although Judge Youngdahl did not hear all the evidence under oath, it is urged that he was sufficiently informed to make a fair evaluation of the claim. He had available to him, and had presumably read, the transcript of petitioner's deposition under oath as well as the pre-trial statement listing the special damages of petitioner and the defenses that were to be relied upon by the third party defendant. Counsel for both sides were present and able to state their positions. And, at this point, it might be noted that there would be no practical benefit to the judge in having available counsel for the insurance carrier who had not participated in any way in earlier proceedings of the case. Any knowledge that he could acquire about the case at this juncture would be learned in the same manner by which the judge was informing himself. His ability to evaluate the claim was on a par with the judge's.

The key words in the *Banks* case do not hold that a trial is always necessary. This Court made the following quote from *Bell v. O'Hearne*, supra:

> "Section 33(g) protects the employer against his employee's accepting too little against a third party. The danger is not present where damages are determined, not by negotiations between the employee and the third party but rather by the independent evaluation of a trial judge."

What is emphasized here is the judge's participation as against the two parties dealing alone, and that participation resulting in the judge making an independent evaluation of the claim. There is nothing in the language requiring the judge to sit through a complete trial in order to have a basis for his independent evaluation. In fact, such a condition would be contrary to this Court's concern with the already overburdened trial calendars throughout the country.

It is submitted that a great deal of confusion and misunderstanding has resulted from the Court's making a distinction between a compromise and a judicial determination.

Too much has been made of the word "compromise" as a term of art. "Compromise" has been viewed synonymously with "settlement" and the settlement of this type of claim by any means appears to be viewed as unacceptable under the opinion promulgated by the United States Court of Appeals for the District of Columbia Circuit. It is urged that this Court in *Banks* did not hold that all settlements are unacceptable pursuant to Section 33(g) but that a distinction is made when the settlement is the result of a judicial evaluation. At the very least, the compensation's carrier should be required to show that the settlement resulted in prejudicing his position. He should not receive the benefit of a conclusive presumption of prejudice.

The Act is to be construed liberally for the benefit of employees and their dependents.[2] In their favor doubts, including the factual, are to be resolved.[3]

The second distinction found by United States Court of Appeals is that the figure arrived at by Judge Youngdahl's evaluation was not the same as a remittitur in that he did not say that it was the highest amount he would accept.

It is urged that this distinction washes away like footprints before a rising tide when placed in its proper perspective. All we are really discussing is at what particular juncture of the case is the force being applied. In the *Banks*

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[2]Voris v. Eikel, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953); Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. at 414, 52 S.Ct. 187; Hancock v. Einbinder, 114 U.S.App.D.C. 67, 70, 310 F.2d 872, 875 (1962); Phoenix Assurance Co. of New York v. Britton, 110 U.S.App.D.C. 118, 120, 289 F.2d 784, 786 (1961); J. V. Vozzolo, Inc. v. Britton, 126 U.S.App.D.C. 259, 262, 377 F.2d 144 (1967).

[3]Howell v. Einbinder, 121 U.S.App.D.C. 312, 314, 350 F.2d 442, 444 (1965); Hancock v. Einbinder, supra note 2, 114 U.S.App.D.C. at 70, 310 F.2d at 875; Phoenix Assurance Co. of New York v. Britton, supra note 2, 110 U.S.App.D.C. at 120, 289 F.2d at 786; Friend v. Britton, 95 U.S.App.D.C. 139, 141, 220 F.2d 820, 821, cert. den.; Harry Alexander, Inc. v. Friend, 350 U.S. 836, 76 S.Ct. 72, 100 L.Ed. 745 (1955); J. V. Vozzolo, Inc. v. Britton, 126 U.S.App.D.C. 259, 262, 377 F.2d 144 (1967).

case the jury made a judicial evaluation that exceeded the bounds of reasonableness set by the judge. He then made a judicial evaluation—a compromise figure—and told the claimant that if he did not accept this figure he must stand a new trial which would more than likely result in a third evaluation differing from the other two.

In the instant case, petitioner could accept the independent judicial determination made by Judge Youngdahl or face trial. This pressure, as a practical matter, was just as real as that presented in *Banks.* The only difference is the time at which it is applied and being applied at the very moment when trial is at hand really causes the pressure to be more substantially felt. Any plaintiff's attorney that has ever come to that final moment with a case having a poor basis for liability will voice his accord to that.

The third distinction drawn between the cases seems to be based on the premise that only a jury trial would suffice to avoid prejudice to the compensation carrier. However, this is not the case if a remittitur is a judicial evaluation. As a matter of fact, this argument seems to fly in the face of the rationale of *Banks,* since it was not held there that a jury trial was at all required.

The case holds that the two parties alone cannot settle. It is submitted that the compensation carrier's interest is adequately protected if the judge participates and renders his independent evaluation of the claim.

## II

## PETITIONER ALLEGES THAT THE DEPUTY COMMISSIONER ERRED IN NOT FINDING HIM TO BE PERMANENTLY TOTALLY DISABLED.

At the same time that the trial judge granted respondent's Motion for Summary Judgment, he denied the petitioner's Cross-Motion. This Cross-Motion was based on the lack of substantial evidence to support the finding that petitioner was only entitled to be compensated for temporary partial disability (25% impaired) for a period extending from November 2, 1963, to October 13, 1965. There were no

findings of facts made by Judge Hart in denying this Cross-Motion. It is believed that this was because the matter became moot when he granted respondent's Motion.

It is urged that the finding of the Deputy Commissioner was arbitrary and was not supported by any of the evidence that he had before him.

This evidence consisted of the sworn testimony of Dr. Marvin Korengold (A. 10) who appeared at the request of the petitioner and a letter written by Dr. Leon Yochelson to John F. Mahoney, Esquire. The letter was moved into evidence by the respondent with the petitioner's consent. (A. 50)

Petitioner will first discuss Dr. Yochelson's letter which was dated December 23, 1965, and was based on an interview he had with the petitioner five days earlier. This would be over three years after the accident and almost two years prior to the hearing.

Dr. Yochelson traced the history of petitioner from birth, through his military service which resulted in a Disability Discharge in 1943 on the basis of psychoneurosis, anxiety and finally up to his visits to doctors following the accident. He concluded with a diagnosis that petitioner had a history both of periods of anxiety and of an unstable, inadequate and dependent personality. On the basis of his premise that petitioner's personality at this time is no different than it had always been during his adult life, he reached the conclusion that there was no relationship between petitioner's complaint and the accident. This is a legal conclusion and contrary to the case law in the District of Columbia.

Dr. Korengold's testimony paralleled Dr. Yochelson's letter in finding that petitioner still suffered from a mental illness. He said, "from an emotional point of view I cannot visualize this man working unless the psychiatrists are able to help him." (A. 21)

This was the total evidence relating to petitioner's injury. There was no evidence that petitioner had recovered to the extent that he could return to work nor did the Deputy

Commissioner make such a finding on the basis of the record. Instead, he made what can only be designated as a "status" finding which, on its face, is in conflict with the case law in the District of Columbia.

The Deputy Commissioner held that the petitioner's condition reverted on November 1, 1965, to his status which existed immediately prior to the accident. This is to say that as of November 1, 1965, although there is no change in the petitioner's condition, its cause arbitrarily becomes the result of the pre-existing condition and is in no way affected by the accident. Therefore he is precluded from further compensation.

A tort-feasor must take his victim as he finds him: This maxim has been applied in the District of Columbia in compensation cases.

> "In a negligence case, the question is not what the accident would have done to a different man, but what it actually did to its victim. This is equally true in compensation cases. Therefore, the employer must, in general, compensate the workman for the consequences of an accident although his previous defects cooperated in producing them." *National Homeopathic Hospital Association of D.C. v. Britton*, 79 U.S. App. D.C. 309, 147 F.2d 561 (1945).

Here we have a case of a man with a latent mental condition on October 18, 1962, who for two years had been steadily employed. On October 19, 1962, he suffered an injury which aggrevated this condition. Since that date, the petitioner has been unemployed. On August 24, 1966, the Deputy Commissioner made the following finding:

> "That as a result of the injury the claimant has been wholly disabled from October 20, 1962, to November 1, 1963, inclusive, 54 weeks, and for such temporary total disability he is entitled to compensation at the maximum rate of $70.00 per week, in the amount of $3,780.00." (A. 2)

On December 23, 1965, Dr. Yochelson, who examined the petitioner at the request of the third party tort-feasor made

a diagnosis that the petitioner's mental illness existed his entire adult life. Because of this, he found no relationship between it and his complaints deriving from the accident. Nowhere does he find that the petitioner is capable of working and that he is no longer disabled.

Finally there is the earlier mentioned testimony of Dr. Korengold, resulting from his examination of petitioner, in which he stated after protesting that he did not know whether it would be fair for him to state:

> "But from what I have been able to see and observe of this man, I feel he is emotionally seriously disabled. And I am not taking the position that he is emotionally disabled at this point because exclusively of the accident. I am taking the position that the accident increased his emotional stress and helped to fixate in some way this man upon his emotional symptoms." (A. 21)

When asked directly by the Deputy Commissioner if he thought petitioner was totally disabled, the doctor stated that he didn't think he was from a physical point of view but that he could not see the man working again unless the psychiatrist could help him with his emotional problem.

Petitioner contends that there has been no changes in the petitioner's condition since the date of the accident. That the assignment of a "before and after" status by the Deputy Commissioner was an error in law. It is urged that there was not sufficient evidence to support the Deputy Commissioner's finding of temporary partial disability. There is no way this result can be reached in the light of petitioner's pre-existing condition without an arbitrary determination medically impossible to ascertain. Petitioner contends that the only finding the Deputy Commissioner could make was permanent total disability.

## III

## QUESTIONS OF TIMELINESS RAISED BY RESPONDENT

Respondent, in his Opposition to petitioner's Petition for a Writ of Certiorari, raised two issues of timeliness that they raised before the District Court and the United States Court of Appeals. The first of these concerned petitioner's application to modify the first award made by the Deputy Commissioner on August 24, 1964. (A. 27)

### A. Timeliness of Notice of Modification of Award Before Employee's Compensation Bureau Waived

It is contended that respondent waived the question of timeliness when he did not raise it at the first hearing of the claim. The record shows that when the Deputy Commissioner asked respondent's counsel to state the grounds of controversy of the application for modification, respondent took the position that "the condition of the claimant is not related to the injury of October 19, 1962" and that "there is a bar to further recovery by virtue of the fact that there was a prior settlement" of the third party claim in contradiction of Section 33(g). No mention was made, or issue raised, concerning timeliness of the modification application. Section 13(b) of the Act is specifically applicable to applications for modifications as well as original claims. Section 13(b) provides:

> "Notwithstanding the provisions of subdivision (a), failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right *unless objection to such failure is made at the first hearing of such claim* in which all parties are given reasonable notice and opportunity to be heard." (Emphasis added).

Furthermore, apart from the statutory waiver, it is well settled that for an issue to be brought before the Court for judicial review under Section 21(g) it must have been raised before the Deputy Commissioner and where the record does

not show that it was raised, it will be considered as having been waived and will not be heard by the Court.[4]

### B. Timeliness of Filing Answer, Cross-Claim and Counter-Claim Before United States District Court

On this question there has been very little written in case law especially since the Federal Rules of Civil Procedure came into being. The interpretations made in cases antedating the Rules as now promulgated can only be viewed by their effect in bringing about the rules.

In the instant case it is conceded that if the petitioner had been dissatisfied with the award made by the Deputy Commissioner, he would have been able to file his appeal in the District Court within the thirty-day period set by Section 921 of the Longshoremen's and Harbor Workers' Compensation Act. Thus, if the respondent employer and insurance carrier had not themselves filed the appeal on the 29th day, the status quo would have remained in effect, and on the 31st day conditions would be no different for petitioner. However, as soon as the respondent filed suit the petitioner no longer had a vested interest in the award by the Deputy Commissioner, but merely a highly tentative award and was even faced with the possibility of receiving nothing.

Thus we are faced with this question. Must the petitioner, having accepted a situation, which situation has been altered by the acts of another, the respondent here, be content to merely retain passively his previous situation despite the fact that the respondent desires to alter not only the respondent's situation but of necessity the petitioner's situa-

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[4]Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941); Britton v. Great American Indemnity Co., 110 U.S.App.D.C. 190, 290 F.2d 381, (1961); Maryland Casualty Co. v. Cardiollo, 71 U.S.App.D.C. 160, 107 F.2d 959 (1939); Metropolitan Casualty Ins. Co. v. Hoage, 67 App. D.C. 54, 89 F.2d 798 (1937)

tion. In other words, may petitioner now decide that the original award was insufficient and that if the respondent is permitted to ask for relief, may petitioner also ask for an increase in his award?

In the respondent's brief opposing the intervenor's counter-claim and cross-claim in the District Court below, respondents cited as one of their authorities *Associated Indemnity Corporation v. Marshall,* 71 F.2d 235 and 420.

Aside from the fact that the *Associated* case was decided in 1934, before the Federal Rules of Civil Procedure came into effect, the law decided by this case is unclear. The case is actually two cases, No. 7118 being reported at p. 235 of 71 Federal 2nd and No. 7235 at page 420.

In the latter decision, the Ninth Circuit Court of Appeals said, per curiam:

> 'The question involved in case No. 7118 was whether an appeal by a party indefinitely extends the time for an independent appeal by the other party or parties. To this question the Court answered in the negative.
>
> 'In the instant case the question is whether or not an appeal in the manner provided by law by one party gives the other party the right to answer the complaint and to set up by way of answer all defenses possible including a counterclaim or offset.'

It may also be significant that, in *Associated* the insurance carrier was attempting to upset an award to a claimant because in No. 7118 (at page 236) Judge Mack said:

> "To permit an attack upon the award at any time after the thirty-day period in order to obtain a *decrease* in the amount merely because the beneficiary had in proper time sued to set aside the award in order to obtain a larger award *would expose the beneficiary to the danger, in fact threatened in this suit,* of a suit for overpayments in case the attack, made too late as a strictly original proceeding, should be successful." (Emphasis added).

But the reasoning behind the court's decision in both Nos. 7118 and 7235 becomes incongruous when read in the light of the following portion of Judge Mack's decision (at page 237) which immediately follows the excerpt above:

> "It is suggested that it would be to the advantage of a party intending to litigate to delay filing suit until the end of the 30 day period in order to catch off-guard an adverse party, who, although he had substantial grounds for challenging the award, might prefer not to indulge in the expense of litigation unless forced to do so by the other party. In order to protect himself in case of such a last minute attack, such a party would be forced to file suit to set aside the award. The dangers thus suggested are not substantial enough to offer a persuasive guide to interpretation; moreover, one who has not appealed may intervene to sustain an award against attack. (Citing cases)."

It is submitted that the situation which Judge Mack believed to be "not substantial" is precisely the situation in which the petitioner now finds himself embroiled. In the present case, after petitioner's award by the Deputy Commissioner, the employer and its insurance carrier did wait until the 29th day to appeal the Deputy Commissioner's Order and the petitioner thus found himself in the position of being unable to protect his interests and it is submitted that Judge Mack's statement that "one who has not appealed may intervene" supports the intervenor's position rather than that of the respondent.

The only other authority relied upon by the respondent in the District Court is *Shugard v. Hoage*, 67 U.S.App.D.C. 52, 89 F.2d 796, but it is not seen to what extent this latter case is applicable since *neither* party had appealed the Deputy Commissioner's decision until after the thirty-day period had expired.

In fact, one of the authorities cited by Judge Mack in support of the foregoing statement is *United States Casualty Company v. Taylor, et ux*, (C.A. 4) 64 F.2d 521, cert. den.

1933, 290 U.S. 639, 54 S.Ct. 56, 78 L.Ed. 555, in which the Fourth Circuit took the opposite view.

This decision also involved two appeals, in one of which (No. 3410) it was decided that the claimant was not covered by the terms of the Longshoremen's and Harbor Workers' Compensation Act. However, the other case (No. 3411) related directly to the question as to whether or not the insurance carrier was properly permitted to intervene.

Originally, the Deputy Commissioner had held that the claimant was not employed in maritime work and therefore was not entitled to recover, under the Act. The unsuccessful claimant filed a complaint in the District Court to have the order set aside, and was successful at that point in convincing the District Judge of the righteousness of his claim. Of course, the insurance carrier, U.S. Casualty and *not* appealed the Deputy Commissioner's Order; it was content with its lot.

However, when the District Court reversed the Deputy Commissioner, the insurance carrier suddenly found itself in an untenable position of liability and therefore *after the District Court had rendered its original decree,* U.S. Casualty moved that (a) the decree be set aside and (b) that it be allowed to intervene as a party defendant so that it might prosecute an appeal.

In rejecting the claimant's theory that the insurance carrier could not be a party defendant because Section 921 of the Longshoremen's and Harbor Workers' Compensation Act says that suits can only be brought against the Deputy Commissioner, the Fourth Circuit Court of Appeals said, at page 526:

> "If this interpretation is correct, the result would be that only the losing party before the deputy commissioner, whether it be the injured workman on the one hand, or the employer or the insurance carrier on the other, would have the right to be heard in the injunction suit in either the District Court or in the Circuit Court of Appeals, and the successful

> party before the deputy commissioner would have no right to defend the advantage which he had won. This conclusion is too unreasonable to be entertained."

It is submitted that, even though *U.S. Casualty* was also decided before the Federal Rules of Civil Procedure became effective, the logic of the foregoing decision is wholly consistent under Rules 13 and 24 of Federal Rules of Civil Procedure, with permitting the present petitioner "to defend the advantage which he had won" in the present case.

Insofar as the right of a compensation claimant to intervene after an insurance carrier has filed an appeal, this appears to be a case of first impression, either prior to or following adoption of the Federal Rules of Civil Procedure.

In *Moore's Federal Practice*, 2nd Ed., Vol. 3B, in discussing the absolute right to intervene under the 1966 version of Rule 24(a) with its requirements of interest, impairment and inadequacy of representation, Prof. Moore sums it up under Sec. 24.09-1 (1) (pp. 24-285 of the 1970 revision):

> ". . . considering the impact on his interest if he is not given the right to intervene, should the applicant now be granted that right?"

Thus, it would seem that the proper basis for allowing, or refusing, intervention rests upon a determination of the "balance of interests."

In *Kozak, et al v. Wells, et al*, 278 F.2d 104, decided in 1960 by the Eighth Circuit Court of Appeals, the then Circuit Judge Blackmun, thoroughly discussed the facets of intervention as a matter of right. Although one of several intervenors did not file his motion until almost a year after the filing of the original complaint, it was considered timely because no prejudice had been shown, and

> "Timeliness is to be determined from all the circumstances shown." (page 109)

Judge Blackmun, citing *Wolpe v. Poretsky*, 79 U.S. App. D.C. 141, 144 F.2d 505, 508, cert. den. 323 U.S. 777, 65 S. Ct. 190, 89 L. Ed. 621, said that "there are even occasions

where intervention is proper after judgment" (Page 109). *Kozak v. Wells,* supra, is also authority for the fact that the inadequacy of the representation of the intervenor's interests need not be positively shown; it is enough if such representation *may* be inadequate (page 110). It is also not essential that the effect of the ultimate judgment be res judicata as to the intervenor if the effect is such that the intervenor in a very real sense would be bound (page 110). And, in the present action, petitioner in a very real sense *will* be bound by the outcome.

In *Wolpe et al v. Poretsky, et al, supra*, the Zoning Commission of the District of Columbia rezoned a tract of land after the public hearings, as required by law. The defendant, Poretsky, brought suit to prevent the Zoning Commission from carrying out the zoning order, and the Court held that the Commission had been capricious and arbitrary and enjoined the change of classification. The Court thus restored the previous zoning which would permit the erection of the apartment houses. On April 8, *after the decree was entered,* the Zoning Commission voted not to appeal and changed the zoning classification as directed by the Court.

On May 6, a large number of property owners filed a Motion for Leave to Intervene for the purpose of moving for a new trial, or, in the alternative, for the purpose of an appeal. This Motion was denied and a special appeal was taken.

In holding in favor of the property owners, the Court of Appeals for the District of Columbia held that:

> "The failure of the Zoning Commission to take an appeal clearly indicates that its representation of the interest of the interveners was inadequate. We do not go so far as to hold that adequate representation requires an appeal in every case. But here an administrative body is charged with arbitrary and capricious action in the face of a strong presumption that they properly performed their duties." (page 507).

The Court also said:

> "We do not pass on the merits of the court's findings or decree because the evidence is not before us. We only indicate that there is enough in the record to show that in refusing to take an appeal the Commission did not adequately represent the intervenors' interests." (Page 508)

The Court went on even further and said that intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected, citing *U.S. Casualty Company*, supra, and Moore's Federal Practice, pp. 2384 and 2385.

While no case involving a claimant-intervenor under the Longshoremen's and Harbor Workers' Compensation Act has been found, it seems clear, according to the majority of cases relating to the subject and according to Prof. Moore, that when intervention is a matter of right, the intervenor clearly may certainly press a counter-claim arising out of the same transaction, or series of events.

In *United States v. Fidelity & Deposit Co.* (MD Pa. 1958) 22 F.R.D. 248, an action was instituted by Automatic Sprinkler Corp. against the prime contractor, Merritt, and its sureties for money due for work performed by Automatic in installing sprinkler system at the Signal Corps Depot at Tobyhanna, Pennsylvania. Plaintiff was a subcontractor of one Raff, who, in turn, was a subcontractor of Merritt. Merritt filed a third party complaint against The American Surety Company which was surety for Raff.

Raff intervened because he was notified that the suit had been filed and therefore (a) he would be bound by a judgment entered against American Surety and (b) the representation of Raff's interests might be inadequate because Raff had defenses and/or counter-claims to assert against Merritt which could not be asserted by American.

Intervention was allowed as being a typical example of permissive intervention, although Prof. Moore considered this to be a matter of right (*Moore*, Vol. 3B, Sec. 24.17, (3.-1) note 15).

In *Switzer v. Locklin* (C.A. 7, 1954) 207 F.2d 483, cert. den. (1954) 347 U.S. 912, 74 S.Ct. 477, 98 L. Ed. 352, Switzer had charged a number of defendants with infringement of patents. Locklin and Brant, doing business as Radiant Color Company, were granted leave to intervene but were denied the right to file a counterclaim. On appeal the counterclaim was allowed.

Radiant was not named as one of the original defendants, but the original complaint alleged that defendants had procured infringing material from Radiant. Radiant's counterclaim had alleged violations of antitrust laws by Switzer.

In allowing the counterclaim, the Court said (page 487):

> "Without the aid of authority, it would be our view that Radiant's counterclaim comes within the terms of Rule 13(a) as a claim which arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction!"

As to cross-claims, Prof. Moore has very little to say other than that "the principles applicable to counterclaims as set forth above (in Section 24.17 (3-1)) should also apply to cross-claims raised by the intervenor." (Section 24.17 (3.-3)). He follows with the simple statement that "By implication Rule 13 does allow the intervenor to raise a related cross-claim." (Citing cases, including *Formulabs, Inc. v. Hartley Pen Co.*, (C.A. 8), 318 F.2d 485 (1963).

In *Formulabs*, Hartley Pen sued DuPont for breach of warranty as to the dye purchased from DuPont for incorporation into ink made by Hartley for use in pens, also made by them. The ink was made by Hartley according to a secret formula supplied by Formulabs and, in the course of the original suit, DuPont sought to learn the secret formula by interrogatories.

Formulabs moved to intervene on the grounds that its right of ownership would be seriously injured if the formula was revealed and prayed that Hartley be enjoined from disclosing trade secrets.

In deciding in favor of the intervenors, the Court said, at page 492:

> "It appears clear under the above allegations that the Intervenors are so situated in respect to the main action as to be adversely affected by a distribution or other disposition of property which is in the custody of or subject to the control of disposition of the court in such action."

The Court also said, further, on page 492:

> "The Intervenors are entitled to their day in court and to have it in connection with the main action. The judgment of dismissal of the complaint in intervention is reversed."

It would appear that although this area of law is somewhat unclear that nevertheless to be consistent with the spirit and purpose of the Federal Rules of Civil Procedure and, furthermore, to interpret the Longshoremen's and Harbor Workers' Compensation Act in a way that conforms with the purpose of the Act, that petitioner's motion to intervene with cross-claim and counter-claims, is to be allowed. The Act itself says that the Deputy Commissioner's Order is suspended until all appeals from it have been adjudicated.

## CONCLUSION

For the foregoing reasons the decision of the Court of Appeals should be reversed and the case remanded with directions that a Summary Judgment be granted to the petitioner and he be awarded compensation for permanent total disability from November 2, 1963, to date.

Respectfully submitted,

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